Supreme Court, U.S.
FILED

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Case #_____

(CADC Case #96-7041)

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN STANTON,
Petitioner

v

DISTRICT OF COLUMBIA
COURT OF APPEALS,
Respondent

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT OR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN STANTON
2101 New Hampshire Avenue NW
Washington, DC 20009
Phone (202) 232-5369

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35 pp

QUESTIONS PRESENTED

1. May respondent District of Columbia (DC) Court of Appeals construe the DC Bar Rules of Professional Conduct to require advocacy for guilty pleas by counsel for the accused in criminal prosecutions?

2. May the federal courts of the DC Circuit abstain from exercising jurisdiction over petitioner's federal constitutional lawsuit challenging respondent's construction of the DC Bar disciplinary rules after respondent repeatedly ignores and disregards the challenge?

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PROCEEDINGS BELOW

This petition is for review of the unduly prolonged proceedings before the United States (US) Court of Appeals for the DC Circuit in *Stanton v DC Court of Appeals*, CADC Case #96-7041, where petitioner appeals from the DC District Court decision to abstain from exercising jurisdiction over his lawsuit challenging

PROCEEDINGS BELOW

respondent's construction of the DC Bar disciplinary rules to require advocacy for guilty pleas by counsel for the accused.

The 23 January 1996 memorandum of the DC District Court decision to abstain from exercising jurisdiction over petitioner's lawsuit and the 27 September 1996 DC Circuit order deferring consideration of petitioner's appeal from the abstention are reproduced and appended to this petition.

JURISDICTION

Petitioner invokes jurisdiction under United States Code Section (§) 28-1254(1) or 28-1651(a) and under Supreme Court Rule 11 or 20 for review of the proceedings pending before the US Court of Appeals for

JURISDICTION

the DC Circuit and for judgment declaring respondent's construction of the DC Bar disciplinary rules in violation of federal constitutional freedom of expression or for a writ or order directing the DC Circuit to act on the merits of his appeal without further delay.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"[There] shall [be] no law ... abridging the freedom of speech," *US Constitution, Amendment I.*

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN STANTON,
Petitioner

v

DC COURT OF APPEALS,
Respondent

ON PETITION FOR WRIT OF
CERTIORARI BEFORE JUDGMENT
OR WRIT OF MANDAMUS TO THE
US COURT OF APPEALS
FOR THE DC CIRCUIT

STATEMENT OF THE CASE

The first question presented for review is whether respondent may not only permit but require advocacy for guilty pleas by criminal defense counsel in criminal prosecutions and for judgment declaring respondent's requirement in violation of federal constitutional freedom of expression.

If review on this question is not granted, this petition is for an order to

the DC Circuit to act without further delay on petitioner's appeal from the decision of the DC District Court to abstain from exercising jurisdiction over his lawsuit challenging the DC Court of Appeals' construction of the DC Bar disciplinary rules to require advocacy for guilty pleas by counsel for the accused in criminal prosecutions as unconstitutional under the First Amendment to the US Constitution.

Respondent's Disciplinary
Actions Against Petitioner

Petitioner is a litigation attorney suspended by respondent indefinitely from and three times denied reinstatement to DC Bar membership and the practice of DC law for his "view of his role as a lawyer"[1] when

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[1] *In re Stanton*, 470 A2d 272, 281 (DC 1983), *cert denied* 466 US 972, 104 SCt 2347 (1984). Petitioner "holds philosophical beliefs concerning the ideal role of the defense attorney which happen to differ from those of individual members of the profession," *Matter of Stanton*, 532 A2d 95, 102 (DC 1987), who oversee the DC Bar disciplinary process.

assisting the accused in criminal prosecutions.

Respondent DC Court of Appeals, which "make[s] such rules as it deems proper"[2] for the admission of attorneys to DC Bar membership and their suspension, disbarment, or exclusion from membership, deems proper rulemaking to require counsel for the accused "[to] assume the role of advocate for a client who desired to plead guilty"[3] and "[to] articulate the guilty plea of a client in court and ... [by] advocating in open court ... to convince a judge of the voluntariness of a guilty plea of a client."[4]

Petitioner was suspended from practice

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[2]DC Code §11-2501(a).

[3]*Matter of Stanton*, 532 A2d at 97.

[4]*In re Stanton*, 589 A2d 425, 426 (DC 1991), *cert denied* 502 US 1098, 112 SCt 1178 (1992).

for *ex post facto*[5] violations of the DC Bar disciplinary rules, and in petitioner's first reinstatement proceedings, respondent "made clear ... that petitioner was being denied reinstatement because he still would not assume the role of an advocate for a client who desired to plead guilty."[6]

In the second reinstatement proceedings respondent ruled that petitioner's position that he is willing "to advise his clients who wished to plead guilty, to participate in plea negotiations with the prosecutor, and to ensure that any plea offer was clearly set forth on the record"[7] was "insufficient"[8] to meet

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[5] *In re Stanton*, 682 A2d 655, 657 (DC 1996). In the DC Bar disciplinary proceedings, petitioner moved to dismiss the allegations as vague and overbroad, raising the due process defense of fair notice, but respondent's procedure "deferred ruling on his motion to dismiss the allegations," *Ibid.*, and respondent never ruled.

[6] *In re Stanton*, 589 A2d at 426.

[7] *In re Stanton*, 589 A2d at 426.

respondent's reinstatement criteria, ignoring and disregarding petitioner's constitutional freedom of expression objections to the ruling.

Petitioner's Lawsuit
Challenging Respondent's Rulemaking

Suspended indefinitely from practice and twice denied reinstatement for his philosophical opinions and beliefs, petitioner applied to the DC District Court for a judgment declaring respondent's rulemaking unconstitutional when, in the course of the proceedings on his third reinstatement petition, respondent indicated that it again would deny reinstatement while ignoring and disregarding his constitutional freedom of expression claim.

Petitioner's complaint to the district court alleged respondent's refusal to

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[8] *In re Stanton*, 589 A2d at 426.

recognize and adjudicate his claim in past and present reinstatement proceedings.

On respondent's motion, the district court stayed and denied discovery, then quickly dismissed the complaint, ruling that "*Younger* abstention ... will ensure that [respondent] have the first opportunity to interpret and apply the ... Rules of Professional Conduct in light of applicable constitutional requirements."[9]

Petitioner moved to set aside the abstention and to enter summary judgment against respondent based on judicial notice of the reported decisions where respondent construes the DC Rules of Professional Conduct to require advocacy for guilty pleas by counsel for the accused. The district court denied this motion, and petitioner appealed to the DC Circuit.

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[9]Abstention decision memorandum, referring to *Younger v Harris*, 401 US 37, 91 SCt 746 (1971).

On appeal, petitioner moved in April 1996 for summary reversal of the abstention decision and for judgment from the DC Circuit declaring respondent without right or authority to require advocacy for guilty pleas for the practice of DC law. Several months later, with no action on the summary reversal motion, he moved to disqualify Circuit Judge and former DC Court of Appeals Chief Judge Judith Rogers from his appeal. On 27 September 1996 the motion to disqualify Judge Rogers was ordered "deferred pending assignment of [the appeal] to a merits panel of the Court."[10]

Meanwhile, on 26 September 1996, respondent DC Court of Appeals denied petitioner reinstatement for the third time for

> inability to draw workable distinctions between his philosophical beliefs and his

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[10]DC Circuit deferral order.

> ethical obligations ... to advise and *carry out the wishes* of individual clients who *may*, due to any number of circumstances, including an aversion to the risks of trial, want to plead guilty,[11]

again ignoring and disregarding petitioner's constitutional claim that there is no right and no authority to require advocacy for guilty pleas and that the requirement violates the First Amendment.

By prompt transmittal of copies of respondent's 26 September 1996 majority and dissenting opinions, petitioner formally informed the DC Circuit of respondent's latest refusal to recognize his constitutional claim, but no DC Circuit "merits panel" has acted on petitioner's appeal, and Circuit Judge Rogers has not disqualified herself.

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[11] *In re Stanton*, 682 A2d 655 at 658 (emphases supplied).

Petitioner now applies to the highest federal court for the judgment deferred by the DC Circuit or for a writ or an order directing Judge Rogers' disqualification and action on the merits of petitioner's appeal without further delay.

ARGUMENT

By stalling on disqualification, Judge Rogers remains in position to delay a DC Circuit decision and deny justice on petitioner's lawsuit, for the record is sufficiently clear and complete, and the question is ripe, ready, and overdue for judgment. If respondent's rulemaking is not declared unconstitutional on this present petition, the DC Circuit should be ordered to disqualify Judge Rogers and to proceed on the question (or certify it here).

Respondent's Rulemaking is Clearly Unconstitutional

Indisputable facts evident from judicial notice of respondent's reported opinions in petitioner's present and previous reinstatement proceedings show that he is entitled to judgment on his federal constitutional freedom of expression claim against respondent's construction of the DC Bar disciplinary rules to require advocacy for guilty pleas.

Respondent DC Court of Appeals claims no authority for its rulemaking, only that it "has found"[12] petitioner's beliefs "contrary to the duties imposed by the canons of ethics on an attorney representing a criminal defendant."[13] Respondent says advocacy for guilty pleas is such a duty, but petitioner believes

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[12]*Matter of Stanton*, 589 A2d at 426.

[13]*Matter of Stanton*, 589 A2d at 426.

advocacy is for trial or defense and that counsel for the accused represent and assist them properly as negotiators and advisors in plea bargaining; further, he believes that as advocates for guilty pleas counsel coerce the accused and corrupt the voluntariness and validity of guilty pleas.

Voluntariness is the "long-standing test for determining the validity of a guilty plea,"[14] and no defendant, properly advised by counsel, has undue difficulty in speaking up spontaneously "to announce his decision to plead guilty in open court by saying, 'Judge, I want to plead guilty' at the inception of the proceedings,"[15] thereby ensuring voluntariness and validating the

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[14]*Hill v Lockhart*, 474 US 52, 56, 106 SCt 366, 369 (1985).

[15]*In re Stanton*, 682 A2d at 657. Petitioner also believes advocacy for guilty pleas is constitutionally permissible if "expressly, directly, and specifically," *Ibid*, requested by the accused, if they ever in fact request it.

guilty plea in the best way.

Respondent will not permit this constitutional practice despite the disciplinary rule that "a lawyer may limit the objectives of the representation if the client consents after consultation"[16] and despite the fact that the practice effectively ensures "that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant."[17]

Respondent requires aggressive pursuit of guilty pleas by DC Bar attorneys. According to respondent, "a client's statement in response to a plea offer that,

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[16]*In re Stanton*, 682 A2d at 657, citing DC Bar Rule of Professional Conduct 1.2(c). Representation under Rule 1.2(c) "may exclude objectives or means that the lawyer regards as repugnant or imprudent," but respondent says a lawyer whose clients consent to limiting the lawyer's roles to negotiator and advisor in plea bargaining perpetrates "a refusal to represent clients in pleading guilty," *Ibid.*

[17]*American Bar Association Standards for Criminal Justice*, Standard 14-3.2(a).

'That sounds good. I want to accept that deal,'"[18] should "*trigger* [counsel's] assistance in *effecting* a guilty plea"[19] by articulating the client's guilty plea and by advocating to convince the judge of the voluntariness of the plea. The client who reconsiders or has second thoughts in the meantime then must contradict counsel before the judge to prevent an involuntary plea.

Respondent never recognizes or addresses petitioner's concerns over voluntariness and how advocacy for guilty pleas violates the rights of the accused to voluntary self-incrimination and to the assistance of counsel's advocacy for defense. And although petitioner pledges "[to] assist [clients] in pleading guilty

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[18] *In re Stanton*, 682 A2d at 657 (emphases supplied).

[19] *In re Stanton*, 682 A2d at 657.

in open court"[20] and even to advocate for acceptance of a guilty plea "with a clear, expressed directive from the client,"[21] respondent excludes him from the practice of DC law because he still believes and argues that advocacy for guilty pleas is wrong and harmful and that respondent has no right or authority to require advocacy for guilty pleas.

"Regulations on entry into a profession ... are constitutional if they have a rational connection with the applicant's fitness or capacity to practice the profession."[22] In criminal prosecutions, the essential aim of the legal profession is to guarantee "an effective advocate for

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[20] *In re Stanton*, 682 A2d at 657.

[21] *In re Stanton*, 682 A2d at 657.

[22] *Lowe v Securities and Exchange Commission*, 472 US 181, 228, 105 SCt 2557, 2582 (1985), citing *Schware v Board of Bar Examiners*, 353 US 232, 77 SCt 752 (1957).

each criminal defendant"[23] by "providing assistance of counsel ... to ensure that criminal defendants receive a fair trial."[24]

Under the First Amendment, respondent's requirement "must be tested by its operation and effect."[25] It operates in pursuit of guilty pleas with corrupting effect, and it has no rational connection with fitness or capacity "to ensure that criminal defendants receive a fair trial."

Under the First Amendment, "the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind;"[26] respondent, however, denies freedom

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[23]*Wheat v United States*, 486 US 153, 159, 108 SCt 1692, 1697 (1988).

[24]*Wheat v United States*, 486 US at 159, 108 SCt at 1696-1697.

[25]*Near v Minnesota*, 283 US 697, 708, 51 SCt 625, 628 (1931).

[26]*Wallace v Jaffre*, 472 US 38, 52, 105 SCt 2479, 2487 (1985).

of mind by requiring DC Bar counsel to speak for the accused according to an unconstitutional construction of the disciplinary rules and by restricting expression of contrary, constitutional views and excluding them from practice.

Regulations restricting or curtailing expression are constitutional when "necessary to serve a compelling state interest"[27] or in "situations presenting some grave and imminent danger the government has the power to prevent."[28] The compelling state interests in criminal prosecutions are fair trials and voluntary guilty pleas. Respondent's requirement serves neither interest, and, although respondent perceives defendants "who *may*,

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[27]*Simon & Schuster, Inc v New York State Crime Victims Board*, 502 US 105, 118, 112 SCt 501, 509 (1991).

[28]*Simon & Schuster, Inc v New York State Crime Victims Board*, 502 US at 127, 112 SCt at 514.

due to any number of circumstances, including an aversion to the risks of trial, want to plead guilty,[29]" trials are not dangers respondent has the power to prevent.

Respondent's rulemaking is improper and unconstitutional, and judgment against respondent on the first question presented is imperative.

The Federal Courts Must Exercise Jurisdiction

Although the DC District Court abstained and the DC Circuit deferred to ensure that respondent DC Court of Appeals have "the first opportunity"[30] to declare

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[29] *In re Stanton*, 682 A2d at 658.

[30] The abstaining district judge, a recent DC Bar president whose impartiality is as questionable as Judge Rogers', says in his abstention decision memorandum that petitioner "apparently seeks to enjoin" respondent from issuing a decision on his reinstatement, an obfuscation to make his abstention seem to accord with "the national policy forbidding federal courts to stay or enjoin pending state proceedings," *Younger v Harris* , 401 US at 41, 91 SCt at 749.

judgment "in light of applicable constitutional requirements," respondent's latest opinions again ignore and disregard petitioner's First Amendment claim. Demonstrating disregard of "constitutional requirements," respondent will never be the judge of its own rulemaking requiring advocacy for guilty pleas, yet still the DC Circuit defers while Judge Rogers disregards the disqualification motion.

As DC Court of Appeals Chief Judge, Judge Rogers ignored and disregarded petitioner's constitutional claims and allegations in his previous reinstatement proceedings, and she cannot be an impartial judge of her own decisions against petitioner on respondent's behalf. Under the disqualification statute, petitioner's appeal of the abstention order is undoubtedly a "proceeding in which her impartiality might reasonably be

questioned."[31] She has no discretion, but her duty to disqualify herself is certain; yet she delays, denying justice while shielding her former associates at the DC Court of Appeals from constitutional accountability for their rulemaking.

On the second question presented, a writ or an order should issue as necessary and appropriate in aid of federal jurisdiction.

CONCLUSIONS

Respondent's construction of the DC Bar disciplinary rules to require advocacy for guilty pleas by counsel for the accused in criminal prosecutions should be declared in violation of federal constitutional

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[31]US Code §28-455(a): "Any justice, judge, or magistrate of the United states shall disqualify herself in any proceeding in which her impartiality might reasonably be questioned."

freedom of expression, or a writ or an order should issue to the DC Circuit disqualifying Circuit Judge Rogers and directing action on petitioner's appeal from the DC District Court decision to abstain from exercising jurisdiction over his lawsuit challenging respondent's construction of the DC Bar disciplinary rules.

JOHN STANTON
2101 New Hampshire Avenue NW
Washington, DC 20009
(202) 232-5369

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN STANTON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 95-1952 (JR)
DISTRICT OF COLUMBIA	:	
COURT OF APPEALS,	:	
	:	
Defendant.	:	

MEMORANDUM

Plaintiff is a lawyer formerly admitted to practice in the District of Columbia Bar who was suspended by order of the Board on Professional responsibility and is now seeking reinstatement. His petition for reinstatement lies with defendant District of Columbia Court of Appeals. In this court, plaintiff seeks a declaration that rules issued by the defendant court -- rules that govern disciplinary proceedings against lawyers

and the professional conduct of lawyers -- violate federal constitutional guarantees of due process and freedom of expression. The defendant court moves to dismiss.

The defendant court's role in the reinstatement process is to review the Board on Professional Responsibility's recommendation. That is a judicial proceeding, and this court has no jurisdiction to review the result. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 479 (1983). In this case, however, the defendant court has not yet issue a decision and plaintiff apparently seeks to enjoin it from doing so.

The United States Court of Appeals for the District of Columbia Circuit has never decided whether the District of Columbia is a state for purposes of Younger abstention, see Lashawn A. v. Kelly, 990 F.2d 1319,

1322 (D.C. Cir., 1993). Nevertheless, notions of comity, and a respect for the critical role local courts play in the regulation of attorney conduct, counsel against this court's interference with bar disciplinary proceedings pending before the District of columbia Court of Appeals. See Middlesex County Ethics Committee v. Garden state Bar Association, 457 U.S. 423 (1982); Younger v. Harris, 401 U.S. 37 (1970).

Nothing in plaintiff's complaint suggests a claim for bad faith or harassment. Nothing stands in the way of plaintiff's raising his constitutional claims in the reinstatement proceeding. Younger abstention is therefore appropriate and will ensure that the local courts have the first opportunity to interpret and apply the Bar Rules and Rules of Professional Conduct in light of applicable constitutional requirements. For these

reasons, this court will abstain from exercising jurisdiction over this lawsuit.

An appropriate order is issued herewith.

United States
District Judge

Dated: January 23, 1996

Copies to:

John Stanton
2101 New Hampshire Ave., N.W.
Washington, D.C. 20009

Plaintiff

Marcelline D. Alexander
Assistant Corporation Counsel, D.C.
Major Case Section
Civil Division
Room 6S085
441 - 4th Street, N.W.
Washington, D.C. 20001

Counsel for Defendant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7041 **September Term, 1996**
95cv01952

John Stanton,
Appellant

v.

District of Columbia Court of Appeals,
Appellee

O R D E R

Upon consideration of appellant's motion to disqualify, it is

ORDERED that this motion is deferred pending assignment of this case to a merits panel of the court.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Cheri Carter
Deputy Clerk

Filed SEP 27 1996